JUNE 17, 2013

LAW ALERT

COURT OF APPEAL GIVES THE GREEN LIGHT TO INCLUSIONARY HOUSING ORDINANCES

M David Kroot

John T. Nagle

Polly V. Marshall

Lynn Hutchins

Karen M. Tiedemann

Thomas H. Webber

John T. Haygood

Dianne Jackson McLean

Michelle D. Brewer

Jennifer K. Bell

Robert C. Mills

Isabel L. Brown

James T. Diamond, Jr.

Margaret F. Jung

Heather J. Gould

Juliet E. Cox

William F. DiCamillo

Amy DeVaudreuil

Barbara E. Kautz

Erica Williams Orcharton

Luis A. Rodriguez

Xochitl Carrion

Rafael Yaquian

Vincent L. Brown

Caroline M. Nasella

On June 6, 2013, in *California Building Industry Ass'n ("CBIA") v. City of San Jose,* the Court of Appeal held that inclusionary housing ordinances are valid if they are "reasonably related" to a "legitimate public purpose." This holding means that inclusionary ordinances are more likely to be upheld by the courts and resolves a significant issue regarding how inclusionary ordinances should be analyzed.

Background

Approximately 150 cities and counties in California have adopted inclusionary housing ordinances, requiring market-rate housing developers to include affordable housing in their developments or pay "in-lieu" fees. Many homebuilders have argued that inclusionary requirements can only be justified if market-rate housing creates a need for affordable housing and that cities and counties must complete a 'nexus' study showing that relationship. Cities, counties, and housing advocates, however, have argued that inclusionary provisions are typical land use ordinances, to be upheld if they are reasonably related to the need for affordable housing.

San Jose adopted its inclusionary ordinance in January 2010 after numerous meetings with the development community. It required 15 percent of new units to be set aside for affordable housing or payment of an in-lieu fee or other alternatives.

The Court of Appeal's Decision

The CBIA asserted that San Jose's ordinance would be invalid unless the City were able to show a reasonable relationship between the inclusionary requirements and "the public needs *or impacts* created by the development." The Court disagreed. It found that San Jose's ordinance had been adopted to alleviate the demand for affordable housing by requiring affordable housing in new developments. Consequently, it should be reviewed as an exercise of the City's police power, valid if it bears a reasonable relationship to the public welfare. It would be invalid only if arbitrary, discriminatory, or without a reasonable relationship to a legitimate public interest.

The Court also held that it was CBIA's burden to establish that the City's inclusionary ordinance did *not* bear a reasonable relationship to the public welfare, not the City's burden to prove the ordinance's validity. The Court remanded the case to the Superior Court to evaluate the ordinance under the correct standard. To prevail, CBIA must prove that the inclusionary housing requirements are *not* reasonably related to the City's legitimate purpose of providing adequate affordable housing.

Implications for Inclusionary Ordinances

The Court of Appeal's decision allows cities and communities to adopt inclusionary ordinances applicable to *for-sale housing* without completing a nexus study. Communities should include evidence in the record showing that the inclusionary requirements will help produce affordable housing.

However, under *Palmer/Sixth St. Properties v. City of Los Angeles,* communities cannot impose inclusionary requirements on *rental housing*. Many communities have completed nexus studies in order to impose impact fees on new rental developments, since they cannot require affordable rental housing. This issue is not affected by the San Jose decision.

If you have questions, please feel free to contact Barbara Kautz, Polly Marshall, or any other attorney at Goldfarb & Lipman LLP for more information.

To receive Law Alerts by E-Mail, please visit: http://goldfarblipman.com/library/#